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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SMITHKLINE BEECHAM CORPORATION
d/b/a/ GLAXOSMITHKLINE,

Plaintiff,

vs.

ABBOTT LABORATORIES,

Defendant.

Case No. C 07-5702 CW

*Related per November 19, 2007 Order to
Case No. 04-1511 CW*

**ABBOTT LABORATORIES' REPLY
BRIEF IN SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFF'S COMPLAINT
PURSUANT TO RULE 12(B)(6) -
REDACTED**

Date: March 6, 2008
Time: 2:00 p.m.
Place: Courtroom 2 (4th Floor)

The Honorable Judge Wilken

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1 **I. INTRODUCTION**

2 The antitrust claims in GSK's complaint fail for the reasons addressed in Abbott's omnibus
3 motion addressing all of the new complaints under *Cascade*. Abbott's separately filed motion to
4 dismiss directed specifically to GSK's complaint, as well as this reply in support of that motion,
5 relate to the unique aspects of the GSK complaint that additionally and independently mandate
6 dismissal of GSK's case under Rule 12(b)(6).

7 In addition to its failure to plead a proper antitrust claim under *Cascade*, GSK's case fails at
8 the threshold because GSK's complaint – and the License Agreement that is an integral part of it –
9 affirmatively show that Abbott's patents cover the alleged Boosted Market. This precludes antitrust
10 liability because a patentee cannot be liable for “unlawfully” monopolizing a market its patents give
11 it every right to monopolize. GSK never disputes this law. Instead, GSK argues that it is irrelevant
12 because GSK has avoided specifically alleging “that Abbott's patents [are] valid.” (Opp'n at 7).
13 GSK has it backwards – Abbott's patents are presumed valid by statute and, thus, GSK had to
14 specifically allege invalidity if it believed that allegation was relevant to stating a claim. Moreover,
15 the Supreme Court has held that intentional fraud would be necessary to overcome the antitrust
16 immunity afforded by a government-issued patent. GSK has not even alleged patent invalidity, let
17 alone unenforceability based on intentional fraud. Accordingly, GSK has pleaded its Sherman Act
18 claim out of court.

19 GSK also argues that the Ninth Circuit's decision in *Image Technical Services Inc. v.*
20 *Eastman Kodak & Co.*, 125 F.3d 1195 (9th Cir. 1997) authorizes its patent-monopoly leveraging
21 theory despite Abbott's patents. But GSK has misread *Kodak*, which addressed an attempt to
22 monopolize a *non-patented* market, not a *patented* market. As noted, GSK's complaint, in
23 combination with the License Agreement, which the parties agree was incorporated by reference into
24 the complaint, specifically states that Abbott's patents cover the Boosted Market (the allegedly
25 monopolized market here). No case, including *Kodak*, endorses the notion that the Sherman Act
26 prohibits a patentee from monopolizing a patented market. Antitrust laws “do not negate the
27 patentee's right to exclude others from patent property.” *Intergraph Corp. v. Intel Corp.*, 195 F.3d
28 1346, 1362 (Fed Cir. 1999).

1 GSK next argues that Abbott waived its antitrust immunity under the patent laws by entering
2 into its License Agreement with GSK. But no court has held that license agreements eliminate
3 patent immunity, and for good reason. Licensing a patent is an enforcement, not an abandonment, of
4 the right to exclude under a patent. To the extent that conduct by Abbott was purportedly
5 inconsistent with the GSK license, GSK's exclusive remedy would be under contract laws in
6 accordance with the specific terms of the parties' License Agreement, not under the antitrust laws.

7 GSK's Sherman Act claim should be dismissed on the independent ground that it is barred by
8 controlling Federal Circuit precedent, which squarely rejects a monopolization claim based upon
9 alleged leveraging of monopoly power that itself derives from a patent (here, Abbott's patent on
10 Norvir). As discussed in Abbott's opening brief, GSK's patent-monopoly leveraging claim requires
11 GSK to plead and prove – as an element of its claim for relief – that, at a minimum, Abbott's alleged
12 exclusionary conduct extended “beyond the grant of a patent.” *Kodak*, 125 F.3d at 1216. The fact
13 that a well-pleaded complaint would include this essential element confers Federal Circuit
14 jurisdiction, and Federal Circuit precedent dooms GSK's antitrust claim.

15 GSK also has failed to justify its implied covenant claim. GSK seeks to impose on Abbott a
16 central, independent, implied contractual obligation to maintain Norvir's price at levels that GSK
17 deems acceptable. (Compl. ¶ 64). At the time of the contract, however, GSK never negotiated any
18 limitation on Abbott's right to set the price of its own patented product – an “agreement” that, if
19 reached, would have blatantly violated the Sherman Act as a price-fixing agreement between direct
20 competitors. Not surprisingly, therefore, GSK points to nothing in the License Agreement even
21 indirectly referencing Norvir's price. Settled New York law, which GSK never disputes, precludes
22 the use of the implied covenant of good faith and fair dealing to create “independent contractual
23 rights” not implicated by the terms of a contract. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v.*
24 *Xerox Corp.*, 25 A.D.3d 309, 310 (1st Dep't 2006).

25 Finally, GSK's North Carolina claims fail in light of the fact that, with *Cascade*, federal
26 courts – in the Ninth, Seventh and Federal Circuits – now uniformly reject the federal antitrust claim
27 on which it is based. Further, even were this Court to disagree about the dispositive effect of
28 *Cascade*, a key question would remain regarding the viability of GSK's North Carolina claims – that

is, whether the North Carolina Supreme Court would follow the Seventh and Federal Circuits' lead in rejecting GSK's theory of antitrust liability. As demonstrated in Abbott's opening brief, there is no basis to conclude that the North Carolina Supreme Court would depart from these rulings. GSK makes no argument to the contrary.

II. ARGUMENT

A. GSK Has Pleaded Its Sherman Act Claim Out Of Court

GSK agrees, as it must, that the Court should consider the License Agreement part of the complaint. (Opp'n at 7). That agreement, along with the allegations in the complaint itself, establish that GSK has pleaded itself out of court with regard to its Sherman Act claim.

1. GSK Admits That Abbott's Patents Cover The "Boosted Market"

As Abbott established in its opening brief, GSK repeatedly represented in the License Agreement that Abbott's patents cover not only the alleged Boosting Market (*i.e.*, ritonavir), but also the alleged Boosted Market (*i.e.*, PI's when boosted by ritonavir). These admissions could not be more express:

Similarly, the complaint alleges that Abbott's "intellectual property" covers "PIs for administration with Norvir" – *i.e.*, the alleged "Boosted Market." (Compl. ¶¶ 17, 20, 21, 36, 38, 40).

In its opposition brief, GSK never disputes that it has alleged that Abbott's patents cover the Boosted Market. Instead, GSK attempts to avoid Abbott's "patent immunity" by arguing that it has not pleaded that "Abbott's patents were valid." (Opp'n at 7). This argument turns patent law on its head. First, patents are presumed valid and enforceable by statute. *See* 35 U.S.C. § 282; *Adenta GmbH v. OrthoArm, Inc.*, 501 F.3d 1364, 1371 (Fed. Cir. 2007). GSK has not alleged in its complaint that Abbott's patents are invalid and, thus, they are presumed valid. Given the presumption of validity and the admissions in the License Agreement, this Court must accept that

Abbott holds valid and enforceable patents covering Norvir in combination with other PIs – *i.e.*, the Boosted Market.

Second, as explained in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 344 F.3d 1294 (11th Cir. 2003), even a declaration of “subsequent invalidity . . . is insufficient to render the patent’s potential exclusionary effects irrelevant to the antitrust analysis” unless the patent was procured by intentional fraud. *Id.* at 1309 (citing *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 179-80 (1965)). Thus, even if GSK had alleged invalidity – which it has not – Abbott’s patent immunity would still defeat GSK’s claim.

2. GSK’s Admission That Abbott’s Patents Cover The “Boosted Market” Bars Its Sherman Act Claim

GSK’s admission that Abbott’s patents cover the Boosted Market is fatal to its Sherman Act claim. As this Court previously held, “[l]egally, a patent amounts to a permissible monopoly over the protected work.” *In re Abbott Labs. Norvir Anti-Trust Litig.*, 442 F. Supp. 2d 800, 808 (N.D. Cal. 2006) (quoting *Kodak*, 125 F.3d at 1215). Antitrust laws are thus implicated only when a patent owner “extends its monopoly beyond the scope of the patent.” (10/21/04 Order at 4). Therefore, given its admission, GSK has failed to allege that Abbott’s purported exclusionary conduct extends beyond the scope of its patent protection.

GSK cannot find refuge in *Kodak*. According to GSK, *Kodak* stands for the proposition that antitrust patent immunity can always be defeated by a showing of pretext. That is not true. *Kodak* did not address an alleged attempt to monopolize a *patented* market; it addressed an attempt to monopolize an *unpatented* market. Specifically, the Ninth Circuit found that Kodak leveraged its monopoly over patented photocopier and micrographic parts by refusing to sell these parts to third-party companies that sought to compete in the separate, unpatented services market. *Kodak*, 125 F.3d at 1218-20. That finding is irrelevant to this case, where GSK has pleaded facts showing that Abbott’s patents cover *both* alleged relevant markets – *i.e.*, the Boosting and Boosted Markets.

Indeed, this Court distinguished the *Doe/SEIU* case from the allegations in another Norvir-related case filed in the Northern District of Illinois because “[i]n that case, unlike in [the *Doe/SEIU*] case, the plaintiff did not challenge Defendant’s assertion that its patents explicitly cover the use of

Norvir as a booster in combination with another PI.” *In re Abbott Labs.*, 442 F. Supp. 2d at 810. As the Seventh Circuit noted when affirming a Rule 12(b)(6) dismissal in the Illinois case, if “the product ‘ritonavir in combination with another protease inhibitor’ is patented to Abbott, [it] is entitled to monopolize the combination.” *Schor v. Abbott Labs.*, 457 F.3d 608, 614 (7th Cir. 2006) (emphasis in original). Accordingly, the pretext concept discussed in *Kodak* is irrelevant here, where GSK’s own complaint alleges that Abbott’s patents cover the Boosted Market.

Moreover, *Kodak* did not address exclusionary conduct through pricing decisions, let alone hold that prices on patented products can subject a patent owner to antitrust liability. The only time the *Kodak* court discussed the pricing of patented products, as opposed to the refusal to deal at issue there, it found that “Kodak is entitled to reap monopoly prices for the sale or licensing of” its patented products. *Kodak*, 125 F.3d at 1218 n.11. This holding is consistent with the Ninth Circuit’s previous holding that “setting high prices in the original ‘monopoly’ market” is among the “ways that a monopolist can permissibly benefit from its position.” *Alaska Airlines Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991). It is simply beyond debate that “[t]he owner of a patented article can, of course, charge such price as he may choose.” *Monsanto Co. v. McFarling*, 302 F.3d 1291, 1299 (Fed. Cir. 2002) (citation omitted).

GSK also mischaracterizes this Court’s decision denying summary judgment in the *Doe/SEIU* case prior to the Ninth Circuit’s issuance of *Cascade*. According to GSK, “this Court in fact considered a nearly identical claim of pretext and found that pretext had been alleged and sufficient facts shown to raise a triable issue of fact.” (Opp’n at 8 (citing *In re Abbott Labs.*, 442 F. Supp. 2d at 808 & n.1)). In that decision, however, the Court merely found that there was a triable issue of fact as to pretext “*if* [Abbott’s] patents do not cover [the] boosted market.” *In re Abbott Labs.*, 442 F. Supp. 2d at 808 (emphasis added). The Court did not hold that a finding of pretext would be relevant to Abbott’s primary argument “that its patents cover the boosted market.” *Id.*

3. The License Agreement Did Not Waive Abbott’s Antitrust Immunity Under The Patent Laws

GSK cannot save its Sherman Act claims by pointing to a private licensing agreement. The whole point of a patent is to create a government-sanctioned right to exclude competition in the

1 patented market. The framers of the Constitution authorized patent laws “to stimulate invention and
 2 reward innovation” by granting the patentee a lawful monopoly concerning the patented invention.
 3 *United States v. Studiengesellschaft Kohle, m.b.H.*, 670 F.2d 1122, 1127 (D.C. Cir. 1981); *see also*
 4 U.S. Const., art. I, § 8. Thus, “[p]atents are not given as favors . . . but are meant to encourage
 5 invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to
 6 exclude others from the use of his invention.” *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225,
 7 229 (1964). As the Supreme Court similarly explained in *Walker*: “A patent by its very nature is
 8 affected with a public interest. . . . [It] is an exception to the general rule against monopolies and to
 9 the right to access to a free and open market.” *Walker Process Equip., Inc. v. Food Mach. & Chem.*
 10 *Corp.*, 382 U.S. 172, 177 (1965) (citation omitted) (emphasis added). Thus, antitrust laws simply
 11 “do not negate the patentee’s right to exclude others from patent property.” *Intergraph Corp.*, 195
 12 F.3d at 1362.

13 GSK nonetheless argues that Abbott waived its antitrust immunity under the patent laws by
 14 entering into the License Agreement. But GSK’s limited contractual rights in the Boosted Market –
 15 including its potential remedies against Abbott concerning conduct in that market – are governed
 16 exclusively by contract laws under the License Agreement, not the antitrust laws.

17 A license agreement, of course, is not an *abandonment* of a patent’s right to exclude. It is the
 18 opposite – it is the *enforcement* of the right to exclude by charging a toll for market entry and, thus,
 19 it *preserves* patent rights. Indeed, one of the “essential rights of a patentee” is the right “to license
 20 others.” *Studiengesellschaft Kohle, m.b.H.*, 670 F.2d at 1127. In exchange for a royalty payment,
 21 the license represents a “covenant by the patent owner not to sue the licensee for making, using, or
 22 selling the patented invention.” *Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc.*, 248
 23 F.3d 1333, 1345 (Fed. Cir. 2001).

24 To the extent that Abbott has allegedly trampled on GSK’s rights under the License
 25 Agreement, GSK may have a *contract action* if the License Agreement prohibits the specific
 26 conduct at issue. Indeed, as GSK itself notes, the License Agreement imposes on Abbott “a
 27 ‘contractual obligation’ to ‘permit GSK to promote and market its PIs in combination with Norvir.’”
 28 (Opp’n at 10 (emphasis added)). But GSK certainly cannot bring an *antitrust action* based on such

1 conduct. Abbott has merely *contractually* waived its ability to exclude GSK from the Boosted
2 Market to the limited extent that the *specific terms* of the License Agreement so provide – *and to no*
3 *further extent*.

4 There is simply no debate that “conduct permissible under the patent laws cannot trigger any
5 liability under the antitrust laws.” *SMC Corp. v. Xerox Corp.*, 645 F.2d 1195, 1206 (2d Cir. 1981).
6 Abbott’s statutory right of exclusion obviously still exists; otherwise, GSK and other PI providers
7 would not be paying a royalty to Abbott. Abbott can, for instance, exclude any non-licensed PI
8 provider and can even exclude GSK from the market if GSK fails to comply with its royalty
9 obligations. Thus, GSK’s sole remedy for any alleged exclusionary conduct is limited by the
10 parties’ contract, not the antitrust laws.

11 GSK has cited no authority – and Abbott is aware of none – holding that entering into a
12 license agreement exposes the patentee to antitrust liability. The cases cited by GSK confirm that
13 license agreements are creatures of contract law and do not in any way alter the antitrust immunity
14 afforded under the patent laws. *Jacobs v. Nintendo of Am., Inc.*, 370 F.3d 1097 (Fed. Cir. 2004),
15 concerned a patent infringement action – not an antitrust action – in which the court merely enforced
16 the “basic contract law principle that a party may not assign a right, receive consideration for it, and
17 then take steps that would render the right commercially worthless.” *Id.* at 1101 (emphasis added).
18 *Anton/Bauer, Inc. v. PAG, Ltd.*, 329 F.3d 1343 (Fed. Cir. 2003), merely noted that license
19 agreements reflect a *contractual* waiver of a patentee’s statutory right to exclude and, as with
20 *Jacobs*, did not address antitrust allegations. Although *Christianson v. Cold Industries Operating*
21 *Corp.*, 486 U.S. 800 (1988), did involve antitrust allegations, that case is irrelevant. The portion of
22 the case relied on by GSK merely noted that the defendant may have *contractually* authorized the
23 plaintiffs to use certain trade secrets. *Id.* at 811. The Court certainly never held that a license
24 agreement waives antitrust immunity under the patent laws.

25 GSK also cannot find refuge in this Court’s statement that relinquishment of patent rights
26 through “an implied license can eliminate patent immunity under anti-trust laws.” *In re Abbott*
27 *Labs.*, 442 F. Supp. 2d at 810. GSK, of course, does not allege the existence of any implied license.
28 It alleges the precise opposite – namely, that Abbott enforced its patents by “demand[ing]” that GSK

1 enter into the License Agreement. (Compl. ¶ 20). To the extent this Court finds the implied license
 2 argument at all relevant, which it is not since GSK is specifically alleging that Abbott *enforced* its
 3 patents, Abbott will avoid duplicative briefing by incorporating by reference its discussion of the
 4 implied-license argument at pages 34-37 of its recently filed summary judgment motion in the
 5 *Doe/SEIU* case.

6 In sum, GSK's pleading admissions that Abbott's patents cover the Boosted Market allow
 7 Abbott to "charge such price as [it] may choose" for its patented invention. *Monsanto*, 302 F.3d at
 8 1299 (citation omitted). GSK's Sherman Act claim, which does not allege exclusionary conduct
 9 beyond the scope of these patents, thus fails as a matter of law.

10 **B. GSK Has Failed To Rebut Abbott's Argument That The Sherman Act Claim**
 11 **Should Be Dismissed Under Federal Circuit Precedent**

12 As explained in Abbott's opening brief, GSK's Sherman Act claim should be dismissed on
 13 the independent ground that it is subject to Federal Circuit jurisdiction and, therefore, is controlled
 14 by Federal Circuit precedent specifically rejecting GSK's theory of liability. This Court's earlier
 15 decisions on a related issue in *Doe/SEIU* are not dispositive because this case concerns a unique
 16 situation in which the plaintiff has actually pleaded that Abbott's patents cover the Boosted Market.
 17 Even if *Cascade* did not separately bar GSK's claim (as it does), GSK's Sherman Act claim would
 18 fail under Federal Circuit precedent because Abbott admittedly enjoyed patent protection in the
 19 Boosting Market.

20 Moreover, *Kodak* makes clear that not only GSK, but the other new Norvir plaintiffs as well,
 21 must at a minimum plead as part of their patent-monopoly leveraging allegations that Abbott has
 22 "attempt[ed] to extend a lawful monopoly *beyond the grant of a patent*." *Kodak*, 125 F.3d at 1216
 23 (emphasis added). The "right to relief" in these cases thus "necessarily depends on resolution of a
 24 substantial question of federal patent law." *Holmes Group, Inc. v. Vornado Air Circulation Sys.,*
 25 *Inc.*, 535 U.S. 826, 830 (2002). GSK has ignored this requirement for a well-pleaded claim and,
 26 instead, summarily asserts that the issue of Federal Circuit jurisdiction has been decided. This Court
 27 has not addressed this specific argument because Abbott previously focused on a pure choice-of-law
 28 issue, rather than a jurisdictional argument given the specific pleading requirement under *Kodak*.

**C. GSK Has Failed To Justify Its Attempt In The Implied Covenant Claim To
Impose Independent Contractual Restraints On Abbott's Pricing Decisions**

As Abbott pointed out in its opening brief, and as GSK seems to acknowledge, New York courts are split on whether even to recognize an independent claim for breach of the implied covenant of good faith and fair dealing. Nevertheless, New York courts have uniformly held that even if such a claim exists, a party may *not* invoke this implied covenant “to create independent contractual rights.” *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Xerox Corp.*, 25 A.D.3d 309, 310 (1st Dep’t 2006); *accord Sutton Assocs. v. Lexis-Nexis*, 761 N.Y.S.2d 800, 804 (N.Y. Sup. 2003) (holding that the implied covenant of good faith and fair dealing “cannot be used to create independent obligations beyond those agreed upon and stated in the express language of the contract”).

The prohibition against creating “independent contractual rights” is based on the basic tenet of contract law that parties are held to the terms of their bargain. As the New York Court of Appeals (New York’s highest court) explained: “Freedom of contract prevails in an arm’s length transaction between sophisticated parties . . . , and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain. If they are dissatisfied with the consequences of their agreement, the time to say so [was] at the bargaining table.” *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 695 (1995) (quotation omitted).

According to GSK’s complaint, Abbott implicitly agreed in the License Agreement to allow GSK “to promote the co-prescription and co-administration of its PI products with Norvir *at prices competitive with those of Kaletra and other PIs.*” (Compl. ¶ 36 (emphasis added)). But pricing of a patented product is central to a patentee’s rights. No court has held that such a central right is impliedly limited by a license agreement that does not have any term that places any limitation whatsoever on this central right. Such a limitation would be the sort of “independent obligations beyond those agreed upon and stated in the express language of the contract” that the courts have rejected.

First, “the implied obligation [must be] in aid and furtherance of other terms of the agreement of the parties.” *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 335 (1987). Here, however, the

License Agreement does not address in any way Abbott's pricing decisions or, specifically, Norvir's price. Nor did Abbott guarantee GSK any share of the Boosted Market. The License Agreement is "in essence nothing more than a promise by the licensor not to sue," *Spindelfabrik Suessen-Schurr Stahlecker & Grill GmbH v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft*, 829 F.2d 1075, 1081 (Fed. Cir. 1987), and, thus, is not an implied agreement to abandon the core right to price Abbott's own patented invention. Indeed, the purpose of the License Agreement was to *enforce* Abbott's right to collect royalties for use of its patented invention not, as GSK alleges, to *waive* Abbott's patent right to set the invention's price. One thing has nothing to do with the other.

A New York federal court dismissed an implied covenant claim under analogous circumstances. In *Geren v. Quantum Chem. Corp.*, 832 F. Supp. 728 (S.D.N.Y. 1993), a bondholder sued to recover for a decline in the value of the bonds after the company paid a special dividend to shareholders. *Id.* at 730. The bondholder admitted that the dividend did not violate the express terms of the parties' agreement, but, rather, alleged that the dividend breached the implied covenant of good faith and fair dealing by reducing the market value of the bonds. *Id.* at 731. The court dismissed the claim under Rule 12(b)(6), holding that implying any such term "would require the court to add a substantive provision for which the parties did not bargain." *Id.* at 733 (citation omitted). The court found this "especially troublesome in light of the fact that the [indenture] could easily have been drafted to incorporate expressly the terms the plaintiffs now urge this court to imply." *Id.* (citation omitted); *see also Hartford Fire Ins. Co. v. Federated Dep't. Stores Inc.*, 723 F. Supp. 976, 991 (S.D.N.Y. 1989) ("[T]he implied covenant of good faith and fair dealing does not provide a court *carte blanche* to rewrite the parties' agreement. . . . Nor can a court imply a covenant to supply additional terms to which the parties did not bargain."); *Golub Assocs. Inc. v. Lincolnshire Mgmt., Inc.*, 1 A.D.3d 237, 238 (1st Dep't 2003) (implied covenant "may not be construed to . . . contrive novel contract rights").

That reasoning is absolutely on point. GSK is a sophisticated party that certainly understood Abbott's right to raise the price of Norvir. If, as GSK alleges, it entered into the License Agreement based on an expectation that future Norvir price increases would be consistent with "past increases," GSK could and should have expressed that expectation and negotiated a contract provision that

1 protected itself from larger price increases. (Compl. ¶ 64). In fact, as noted below, GSK takes the
 2 position that it may have been lawful to agree with Abbott to constrain Norvir pricing to purported
 3 “reasonable levels.” (See Opp’n at 17). Yet, GSK chose to leave undisturbed Abbott’s unfettered
 4 patent right to price Norvir “as [it] may choose.” *Monsanto*, 302 F.3d at 1299 (citation omitted).
 5 The implied covenant of good faith and fair dealing does not allow GSK to reconsider that bargain
 6 after leaving “the bargaining table.” *Oppenheimer & Co.*, 86 N.Y.2d at 695.

7 Second, GSK’s “implied agreement” fails because “a contract that may be construed both
 8 lawfully and unlawfully should be construed in favor of its legality.” *Bloomfield v. Bloomfield*, 764
 9 N.E. 2d 950, 953 (N.Y. App. 2001) (collecting cases). Here, GSK is claiming that Abbott and GSK
 10 implicitly agreed on the price at which Abbott would sell Norvir to consumers, which price their
 11 complaint alleges is critical to the *direct competition* between Kaletra and GSK’s drug Lexiva.
 12 (Compl. ¶¶ 20-24, 46). But an agreement between direct, horizontal competitors on prices – either
 13 maximum or minimum – is a *per se* violation of the Sherman Act. As the Supreme Court has
 14 explained, “[o]ur decisions foreclose the argument that the agreements at issue escape *per se*
 15 condemnation because they are horizontal and fix maximum prices.” *Arizona v. Maricopa County*
 16 *Med. Soc.*, 457 U.S. 332, 348 (1982).

17 GSK responds by weakly arguing that while their alleged “implied agreement” might be
 18 illegal, it would not be “*per se*” illegal because GSK and Abbott do not directly compete in the
 19 “Boosting Market.” (Opp’n at 16-17). That argument ignores that the crux of GSK’s complaint is
 20 that Norvir’s price impacts the direct and horizontal competition between Lexiva and Kaletra in the
 21 so-called “Boosted Market.” (See Compl. ¶ 24 (alleging that “Kaletra . . . face[s] strong competition
 22 from . . . GSK’s Lexiva”)). Because Abbott and GSK do not share a vertical relationship (*i.e.*,
 23 Abbott does not sell Norvir to GSK for resale), the vertical price restraint case that GSK cites, *State*
 24 *Oil Co. v. Khan*, 522 U.S. 3 (1997), is inapplicable. See *Maricopa County Med. Soc.*, 457 U.S. at
 25 348 n.18 (“[H]orizontal restraints are generally less defensible than vertical restraints.”). GSK
 26 alternatively cites cases permitting price fixing agreements between non-competitors in a “joint
 27 venture.” (Opp’n at 17). Those cases are irrelevant [REDACTED]
 28 [REDACTED]

1 Third, [REDACTED]

2 [REDACTED] GSK

3 misses the point of this clause. Abbott does not contend that this clause somehow eliminates the
 4 implied covenant of good faith and fair dealing. The question here is not whether the covenant binds
 5 Abbott to act in good faith with respect to the issues directly, or at least implicitly, addressed *by the*
 6 *express terms of the contract*. But, here, GSK alleges a completely separate and independent
 7 obligation on the part of Abbott to limit future price increases on Norvir referenced nowhere in any
 8 contract provision either directly or even implicitly. The very purpose of the integration clause was
 9 to prevent the parties from asserting “implied agreements” like this that far exceed the four corners
 10 of the express contract. *See Primex Intern. Corp. v. Wal-Mart Stores, Inc.* 89 N.Y.2d 594, 600
 11 (1997) (explaining that integration clause reflects “the parties’ intent that the Agreement is to be
 12 considered a completely integrated writing”).

13 Finally, reading independent, implied obligations into an express contract that contains an
 14 integration clause would hardly be “consistent with the policy behind the implied covenant claim,”
 15 as GSK argues. (Opp’n at 16). To the contrary, allowing GSK’s claim to survive would expand in
 16 an unprecedented way a patentee’s potential liability under a license agreement. Under GSK’s
 17 theory, any licensee could turn around and sue the patentee/licensor for breach of the implied
 18 covenant whenever the patentee asserts its patent rights, such as through a pricing decision, in a way
 19 that purportedly impacts the licensee in the marketplace. But nobody enters into patent license
 20 agreements with the belief that they are “insurance policies” for the licensee’s success in the
 21 marketplace. The Court should reject GSK’s unprecedented argument, which would be bad policy
 22 in any circumstance and certainly with respect to a license agreement between sophisticated
 23 companies.

24 **D. GSK’s North Carolina Claims Should Be Dismissed Because They Are Based**
 25 **Solely On Conduct That Should Be Deemed Lawful Under North Carolina Law**

26 GSK’s allegations fail to state a claim under the North Carolina Unfair Trade Practices Act
 27 (“UTPA”), which prohibits unfair, deceptive, or anticompetitive acts. GSK’s complaint focuses on
 28 allegations of anticompetitive conduct, and these allegations form the basis of its North Carolina law

1 claims. Consequently, dismissal of GSK's Sherman Act claim necessarily warrants dismissal of
2 these related state law claims as well. *See R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.*, 199 F.
3 Supp. 2d 362, 395-96 (M.D.N.C. 2002) (holding that dismissal of federal antitrust claims meant that
4 the "state . . . statutory claims fail as well").

5 But even if this Court were to allow GSK's Sherman Act claim to proceed (despite recent
6 Ninth Circuit precedent that Abbott submits squarely bars that claim), the viability of GSK's North
7 Carolina claims would turn on a choice-of-law question virtually ignored in GSK's opposition brief.
8 As Abbott explained in its opening brief, the Seventh and Federal Circuits have both made it clear
9 that, even aside from the *Cascade* rule, the alleged exclusionary conduct in the complaint is perfectly
10 lawful. *Schor*, 457 F.3d at 613; *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed.
11 Cir. 2000). GSK does not dispute this. Instead, GSK summarily states – without explanation – that
12 "Ninth Circuit law governs" not just its Sherman Act claim but also its North Carolina claims.
13 (Opp'n at 22).

14 GSK is wrong. The case relied on by GSK itself confirms that North Carolina courts look to
15 federal antitrust laws "for guidance." *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 48 (4th Cir.
16 1983). But North Carolina law ultimately controls application of the UTPA. *See, e.g., Marshall v.*
17 *Miller*, 302 N.C. 539, 542-43 (1981). Indeed, GSK concedes in footnotes 7 and 15 of its brief that
18 the North Carolina claims are governed by North Carolina law. Therefore, the North Carolina
19 Supreme Court would be forced to choose which federal precedent to follow "for guidance."

20 The key question, therefore, is how the North Carolina Supreme Court would view the
21 conduct at issue here from the perspective of federal antitrust law. For the reasons explained in
22 Abbott's opening brief – arguments GSK has failed to rebut – there is no basis to conclude that the
23 North Carolina Supreme Court would find that Abbott's conduct was inconsistent with federal
24 antitrust law.

25 Perhaps recognizing that its allegations of anticompetitive conduct under North Carolina law
26 are deficient, GSK focuses its opposition brief on alleged conduct that purportedly is deceptive or
27 unfair. But this does not avoid dismissal. GSK's allegations of "unfair acts" fail to state a claim
28 under the UTPA because they merely rehash GSK's breach of the covenant of good faith and fair

1 dealing allegations. Under North Carolina law, “[a] mere breach of contract, even if intentional, is
 2 not sufficiently unfair or deceptive to sustain an action under” the UTPA, which requires
 3 “substantial aggravating circumstances attendant to the breach.” *Miller v. Rose*, 138 N.C. App. 582
 4 (2000) (citation omitted) (dismissing claim on this basis). Accordingly, GSK’s allegation that
 5 Abbott breached its covenant of good faith and fair dealing, standing alone, is insufficient to state a
 6 claim under the UTPA as a matter of law.

7 GSK is thus left with its allegations of deceptive conduct. As Abbott explained in its moving
 8 papers, however, deceptive acts require allegations of detrimental reliance and injury proximately
 9 caused by the deception. GSK tacitly admits that it has failed to plead detrimental reliance. Instead,
 10 it argues that detrimental reliance is not required where a UTPA claim is based on deception. GSK
 11 is wrong. As the North Carolina Supreme Court explained, the requirement that the UTPA plaintiff
 12 “suffered actual injury as a proximate result of defendant’s deceptive statement or misrepresentation
 13 . . . is similar to the detrimental reliance requirement under a fraud claim.” *Pearce v. Am. Defender*
 14 *Life Ins. Co.*, 316 N.C. 461, 471 (N.C. 1986) (finding evidence sufficient to support finding that
 15 plaintiff detrimentally relied on alleged deceptive statements). And, as the North Carolina
 16 intermediate appellate court recently held in *Bus. Cabling, Inc. v. Yokeley*, 643 S.E.2d 63 (N.C. App.
 17 2007), where a UTPA claim is based on deceptive acts, “*recovery . . . is limited to those situations*
 18 *when a plaintiff can show that plaintiff detrimentally relied upon a statement or misrepresentation*
 19 *and he or she suffered actual injury as a proximate result of defendant’s deceptive statement or*
 20 *misrepresentation.*” *Id.* at 69 (citation omitted) (emphasis added); *see also Hageman v. Twin City*
 21 *Chrysler-Plymouth Inc.*, 681 F. Supp. 303, 308 (M.D.N.C. 1988) (“To prove actual causation, a
 22 plaintiff must prove that he or she detrimentally relied on the defendant’s deceptive statement or
 23 misrepresentation.”).

24 GSK places undue reliance on *Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 580
 25 (2003), which this Court should ignore. In *Cullen*, the North Carolina intermediate appellate court
 26 concluded that the UTPA does not require a showing of reliance – a holding that *directly conflicts*
 27 with the prior, controlling precedent in *Pearce* and the subsequent decision by its sister court in
 28 *Business Cabling*. *Cullen* got it wrong. It failed even to acknowledge *Pearce*, choosing instead to

1 rely upon the holding that “actual deception is not an element” under the UTPA in *Johnson v.*
 2 *Insurance Co.*, 300 N.C. 247, 265 (1980) *overruled on other grounds by Myers & Chapman, Inc. v.*
 3 *Thomas G. Evans, Inc.*, 323 N.C. 559 (1988), a holding later echoed in *Marshall v. Miller*, 302 N.C.
 4 539, 548 (1982). But the *Cullen* court misconstrued this holding. As the *Hageman* court explained,
 5 the phrase “proof of actual deception is not required” was not intended to eliminate the need to show
 6 reliance, but, rather, to relax common law deceit requirements of showing intent to deceive and a
 7 misstatement of fact (as opposed to opinion). 681 F. Supp. at 308-09. Neither *Johnson* nor
 8 *Marshall* addressed the reliance element. Thus, *Pearce* is controlling.

9 Even if detrimental reliance were not required as GSK argues (which clearly is not the case),
 10 the complaint still would fail, as GSK does not allege that it suffered any injury *as a result* of the
 11 allegedly deceptive practices (*Pearce*, 316 N.C. at 471), which even GSK admits is required under
 12 North Carolina law. Of course, the complaint does allege, as GSK notes in its opposition brief, that
 13 GSK suffered injury as a result of the Norvir price increase. But GSK does not allege that the Norvir
 14 price increase was deceptive. Instead, GSK alleges that Abbott made false statements to the public
 15 about its pricing for Norvir and the effect of the price increase on Kaletra’s sales. (*See Opp’n* at 21).
 16 The complaint contains no allegation that these allegedly deceptive acts – as opposed to the price
 17 increase itself – proximately caused any harm to GSK.

18 For these reasons, GSK has failed to properly allege unfair, deceptive, or anticompetitive
 19 conduct under North Carolina law. Both North Carolina claims should be dismissed.

20 **III. CONCLUSION**

21 For the reasons set forth above and in Abbott’s moving papers, this Court should dismiss all
 22 claims in GSK’s complaint with prejudice.

23
 24 Dated: February 21, 2008

WINSTON & STRAWN LLP

25
 26 By: /s/ James F. Hurst
 27 James F. Hurst
 28 Attorneys for Plaintiff